

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1068

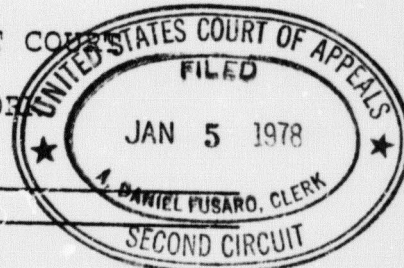
Orig. affidavit & mailing
To be argued by
LAWRENCE ZWEIFACH

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1068

UNITED STATES OF AMERICA,
Appellee,
- against -
BARBARA MEYERS,
Appellant.

*B
P/S*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



SUPPLEMENTAL BRIEF AND APPENDIX FOR THE APPELLEE

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(Of Counsel).

UNITED STATES COURT OF APPEALS
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- - - - - X

UNITED STATES OF AMERICA,

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- against -

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SUPPLEMENTAL BRIEF AND
APPENDIX FOR THE APPELLEE

This supplemental brief and appendix is submitted to inform this Court of various corrections of the record in the above-captioned appeal. By notice of motion dated December 14, 1977, the Government moved before the Honorable George C. Pratt, for an order, pursuant to Rule 10(E) of the Federal Rules of Appellate Procedure and Rule 36 of the Federal Rules of Criminal Procedure, correcting certain errors in the record of this case. On December 29, 1977, Judge Pratt held an evidentiary hearing to correct the record. Section "A" of the attached appendix includes the transcript of this evidentiary hearing. Section "B" of the appendix includes the exhibits introduced at the hearing.

I

In light of the evidence introduced at the hearing, Judge Pratt made the following corrections in the record:^{1/}

(1) Line 7, page 317 ("You may consider, in determining whether...") up to and including line 17, page 319 ("...with Mr. 'DiMitrio' after the time of his arrest on 4/11/75.") was removed from the record. Appendix at 39-41. Thus, Judge Pratt deleted the allegedly "extraneous material" on which appellant relies in her brief (Appellant's Brief at 19-21; see Government's Brief at 7-8, n.5.).

(2) The following sentence was added to follow immediately after the sentence ending on line 20, page 316: "In other words, you may consider the similar acts if you find they occurred as evidence of the defendant's knowledge, motive, intent, plan or absence of any mistake or act." Appendix at 38-39.

(3) Line 15, page 326 ("Now the law permits, but does not...") up to and including line 11, page 327 ("... or colored

^{1/} As we understand appellant's position, she does not dispute Judge Pratt's findings correcting the record.

her testimony might my, could be...) was removed. Appendix at 48-54. This deletion relates to Judge Pratt's instructions regarding the credibility of appellant's testimony. See Government's Brief at 13.

(4) The following language, relating to Judge Pratt's instruction on "voluntariness" (see Government's Brief at 15-17), was added to follow immediately after line 14, page 326:

"Evidence relating to any statement claimed to have been made by any Defendant outside of Court and after a crime has been committed should also be considered with caution and weighed with great care, and all such evidence should be disregarded entirely unless the evidence in the case convinces you, beyond a reasonable doubt, that the statement was knowingly made.

I'm referring here, of course, to the statement of the Defendant, which was marked in evidence and as to the other oral statement which were testified to by Inspector Claus. Now, a statement is knowingly made, if made voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

In determining whether any statement claimed to have been made by the Defendant outside of Court after a crime has been committed is knowingly made, the Jury should consider the age, sex, training, education, occupation and physical and mental condition

of the Defendant and her treatment while in custody or under interrogation, as shown by the evidence in the case; and also all other circumstances in evidence surrounding the making of the statement, including whether before the statement was made the Defendant knew or had been told and understood that she was not obligated or required to make the statement claimed to have been made by her; that any statement she might make could be used against her in Court; that she was entitled 2/

II

The aforementioned corrections substantially affect two of the issues raised by appellant. First, appellant claims that the inclusion in the court's charge of extraneous material pertaining to some other criminal prosecution prejudiced appellant by implying her involvement in additional criminal proceedings not disclosed to the jury (Appellant's Brief at 19). Since Judge Pratt removed the disputed portion of the charge from the record, we submit that this issue has become moot.

Second, appellant argues that the jury was misapprised regarding the standard of voluntariness applicable to appellant's statement (Appellant's Brief at 28). We respectfully submit that Judge Pratt's "voluntariness" charge, modified as indicated above, fully complied with the requirements of 18 U.S.C. §3501(a).

2/ Appendix at 48-54.

As we argue in our main Brief (Government's Brief at 15-17), Judge Pratt's charge relating to "voluntariness" -- even as it read prior to the corrections -- was proper in light of United States v. Barry, 518 F.2d 342 (2d Cir. 1975). In any event, the amendments to the record (which amplified the court's instructions and, in effect, explained the meaning of "voluntariness") further undercut appellant's position.^{3/}

III

For these reasons, and the reasons stated in our main Brief, appellant's conviction should be affirmed.

Dated: Brooklyn, New York
January , 1978

Respectfully submitted,

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LAWRENCE J. ZWEIFACH
Assistant U.S. Attorney
(Of Counsel)

^{3/} Given Judge Pratt's deletions on pages 326 and 327 of the trial transcript see p. 2, para. (3), supra, we can no longer contend, as we did in our Brief (p. 13) that Judge Pratt's charge on appellant's credibility was preferable to that given in United States v. Floyd, 555 F.2d 45, 47 n.4 (2d Cir. 1977). However, Judge Pratt's instruction, as modified, was nevertheless clearly proper under Floyd, which upheld a substantially equivalent instruction.

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----
4 UNITED STATES OF AMERICA :

5 -----
6 BARBARA MEYERS, :

7 Defendant. :

8 -----
9 United States Courthouse
10 Westbury, Long Island
New York

11 December 29, 1977

12
13
14 B E F O R E :

15 HON. GEORGE C. PRATT, U.S.D.J.
16
17
18
19
20
21

22 Raymond P. Stalker
23 Court Reporter
24
25

A P P E A R A N C E S :

DAVID G. TRAGER, ESQ.,
United States Attorney for the
Eastern District of New York

By: LAWRENCE ZWEIFACH, ESQ.,
Assistant United States Attorney.

STEVEN L. BARRETT, ESQ.,
Legal Aid Society
Appearing for Defendant.

000

1
2 MR. BARRETT: Good afternoon.

3 THE COURT: This is a motion by the Government
4 seeking to correct certain errors in the transcript,
5 particularly with respect to the charge; is that
6 correct?

7 MR. ZWEIFACH: That's correct, Your Honor.

8 THE COURT: How are we going to proceed?

9 MR. ZWEIFACH: Well, I have the Court Reporter
10 who worked on your charge in this case with me,
11 Steven Tessler. We also have his notes and right now
12 I have my own copy of the transcript of your charge
13 in the Meyers case which is now pending on appeal
14 before the Second Circuit. I thought at the outset
15 we might want to compare the Court Reporter's notes,
16 have him read his notes and compare it to selected
17 portions of the charge which are in issue on appeal.

18 In addition, if necessary, after speaking
19 with one of your Law Clerks, I know that you have
20 copies in your chambers of the charge which you read
21 in this case. Perhaps we won't even have to go to
22 that. So, I thought first I would want to call Mr.
23 Tessler and have him review his notes under oath.

24 THE COURT: All right, call him.

25 MR. ZWEIFACH: The Government calls Steven

Tessler.

S T E V E N T E S S L E R , having been called as a
witness on behalf of the Government, having
first been duly sworn by the Clerk of the Court,
was examined and testified as follows:

THE CLERK: Please state your full name for
the record.

THE WITNESS: Steven A. Tessler.

THE CLERK: Please be seated and speak into
the microphone.

THE COURT: It's an unusual position to be
in, Mr. Tessler.

THE WITNESS: Very strange feeling.

DIRECT EXAMINATION

BY MR. ZWEIFACH:

Q Mr. Tessler, what is your occupation?

A Court Stenographer.

Q Where did you work on November 17th, and 18th,
1976?

A As an Acting, A.O. for the Eastern District
Federal Court.

Q And on those dates did you have occasion to
act as a Court Reporter in the case of United States against
Barbara Meyers?

1
2 A Yes.

3 MR. ZWEIFACH: I would like these notes
4 marked as a Government's Exhibit?

5 THE COURT: Any objection?

6 MR. BARRETT: No objection.

7 THE COURT: Let it be marked.

8 THE CLERK: So received in evidence as
9 Government's Exhibit Number One.

10 Q Mr. Tessler, I show you what's been marked
11 as Government's Exhibit Number One and ask you to identify it,
12 if you can?

13 A It is the notes of November 17th and 18th
14 in the case of United States versus Barbara Meyers before
15 Judge Pratt.

16 Q I see. Are those notes your notes, did you
17 work on those notes?

18 A Yes.

19 Q And did you have occasion to review those
20 notes before testifying today?

21 A Yes.

22 Q I would like to direct your attention to that
23 portion of those notes--

24 A This is not the right one.

25 Q I'm sorry.

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2 MR. ZWEIFACH: Sir, I would like to get
3 this marked as Government's Exhibit Number Two?

4 THE CLERK: Court Reporter's notes marked as
5 Government's Exhibit Number Two.

6 THE COURT: We're dealing with two packages
7 of notes then?

8 MR. ZWEIFACH: Yes, Your Honor.

9 THE COURT: Both for United States against
10 Meyers?

11 MR. ZWEIFACH: That's correct.

12 THE COURT: All right.

13 Q I now show you what's been marked as Governments
14 Exhibit Number Two for Identification and ask you if you
15 could identify that?

16 A These are my notes in the trial of United
17 States versus Barbara Meyers, and these notes were taken on
18 November 18th, 1976. These are mine.

19 MR. ZWEIFACH: Your Honor, I would like to
20 move these into evidence?

21 THE COURT: Any objection?

22 MR. BARRETT: No, Your Honor. I'm wondering
23 if I should have a voir dire at this point--

24 THE COURT: If you want a voir dire, you're
25 entitled to it.

VOIR DIRE

MR. BARRETT: I can offer all these--do you want to mark the others?

MR. ZWEIFACH: For the sake of completeness I would mark this as Government's Exhibit Number Three?

THE CLERK: Court Reporter's notes marked as Government's Exhibit Number Three.

DIRECT EXAMINATION

BY MR. ZWEIFACH:

Q Mr. Tessler, I show you what has been marked as Government's Exhibit Number Three for Identification, and ask you if you could identify that?

A Yes. These are my notes in the case of United States of America versus Barbara Meyers and they were taken on 11/17/76, before the Honorable Judge Pratt.

VOIR DIRE

BY MR. BARRETT:

Q Mr. Tessler, were those notes in your possession?

A No, they weren't.

Q Do you know where they were?

A Yes. I have an idea where I left them when I left the Court, whether they were moved, I don't know.

Q Where?

A In a file cabinet under my name.

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Q I see.

How are you able to identify these notes at this time?

A My handwriting.

Q Would you indicate to me where you signed these notes?

A I haven't signed them, but this is my handwriting on the top. This is the way I mark my notes in Court.

Q Have you examined the notes themselves or just the wrapper which is covering them?

A Right now?

Q No, have you previous to this point or up to this point?

A Yes, I dictated this case and I had it transcribed.

Q I'm sorry, let me make myself clear; have you since this question arose in the last few days examined these notes to determine whether or not they are in fact the notes you took?

A Just one package.

Q Which package is that?

A November 18th, 1976.

THE COURT: That's Exhibit Two?

1 THE WITNESS: Yes, Exhibit Number Two.

2 THE COURT: What is the date for Exhibit
3 Number One?
4

5 THE WITNESS: Exhibit Number One is November
6 17th, 1976 and 18th, 1976.

7 THE COURT: Then Exhibit Two is also November
8 18th?

9 THE WITNESS: Exhibit Two is November 18th
10 also.

11 THE COURT: All right, proceed.

12 VOIR DIRE CONTINUING

13 BY MR. BARRETT:

14 Q Am I to understand then that at this point
15 the only set of notes other than the outer wrapping that
16 you know to be yours is Exhibit Number Two?

17 A Yes.

18 Q And am I also to understand the three exhibits
19 that have been offered represent all of the notes for the
20 entire trial?

21 A That's correct to my knowledge.

22 MR. BARRETT: Your Honor, I would I suppose
23 object to Number Two going into evidence at this
24 time.

25 THE COURT: On what ground.

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2 MR. BARRETT: On the ground that the witness
3 has not examined the notes and determined them to be
4 his.

5 THE COURT: Look at them and see if they're
6 yours?

7 (Short pause.)

8 THE WITNESS: They're my notes.

9 Q Mr. Tessler, having examined those notes for
10 a few seconds each, can you tell me how you were able to
11 know those were your notes?

12 A By my writing, the way I write on the machine.

13 Q I see--

14 A And the markings also on the outside of the
15 notes.

16 MR. BARRETT: Your Honor, I will withdraw my
17 objection.

18 THE COURT: All three will be marked in
19 evidence as soon as the Clerk comes back.

20 MR. ZWEIFACH: Your Honor, I would--I'm not
21 sure exactly how to proceed here. Perhaps I could
22 submit to you my copy of the transcript in the
23 Meyers case and perhaps you would care to read along
24 as Mr. Tessler reads from his notes? That just might
25 be the best way of making a comparison or if you care

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2 I could read it, my copy of the transcript of the
3 record?

4 THE COURT: What you have in your hand is
5 the transcript which you had prepared from your
6 notes; is that correct, Mr. Tessler?

7 THE WITNESS: I don't have the transcript in
8 my hands.

9 THE COURT: What the Attorney has in his
10 hands?

11 THE WITNESS: Yes.

12 THE COURT: Well, why don't you and Defense
13 Counsel follow the transcript, I'll follow my own
14 notes of what I think I said and if anybody has any
15 difficulties, let them speak up as we proceed.

16 DIRECT EXAMINATION

17 BY MR. WEIFACH:

18 Q Mr. Tessler, I would like to direct your
19 attention to your notes regarding the Court's Charge;
20 first of all you've had an opportunity to go over these
21 notes with me prior to testifying today; isn't that correct?

22 A That's correct.

23 Q I'd like to direct your attention to what
24 would be approximately page 316 of the Court Transcript
25 which you marked before today, and I ask you to begin reading

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2 at that point in the transcript where it says, "But if you
3 find that the Government has clearly, conclusively establish-
4 ed the Defendant performed acts charged in the indictment
5 you may use these acts to help you determine" etcetera?

6 A I would be reading from Government's Exhibit
7 Number Two in Evidence?

8 Q Correct?

9 THE COURT: This begins at what page of the
10 transcript?

11 MR. ZWEIFACH: Page 316.

12 THE COURT: All right.

13 A I'm sorry, could you repeat what you wanted
14 me to start with?

15 Q "But if you find the Government has clearly,
16 conclusively established that the Defendant performed acts
17 similar to that charged in the indictment then you may use
18 evidence of those similar acts?"

19 A "But if you find that the Government has
20 clearly and conclusively established that the Defendant
21 performed acts similar to that charged in the indictment,
22 then you may use as evidence of those similar acts to help
23 you determine one, whether the Defendant willfully possessed
24 the check in question here and two, whether at the time she
25 possessed the check, she knew that it was stolen. In other

1 words, you may consider similar acts, similar acts if you
2 find that they occurred as evidence of the Defendant's know-
3 ledge, motive, intent, plan or the absence of any mistake
4 or act. But, you must not rely on this evidence of other
5 acts for any other purpose. Remember that the Defendant
6 is being tried with respect to a check which she allegedly
7 possessed on or about December 3, 1975. It would be improp-
8 er for you to convict her of a crime not charged in the
9 indictment. Therefore, do not concern yourselves with any
10 possible criminal consequences of the similar transactions
11 as alleged by the Government."
12

13 Q Could you hold it one minute? Please continue?

14 THE COURT: Do you know to that point is
15 there any discrepancy of any significance between
16 what you read and what the transcript shows?

17 MR. ZWEIFACH: There is a gap, Your Honor,
18 after point two where it says, "Whether at the time
19 she possessed the check she knew it was stolen."
20 The transcript picks up with, "But you must not rely
21 upon this evidence of other acts for any other purpose."

22 THE COURT: Then what follows, "In other words?"

23 MR. ZWEIFACH: No.

24 MR. BARRETT: "In other words," is where they
25 cut out.

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2 MR. ZWEIFACH: The portion, "In other words,"
3 is cut out, Your Honor.

4 THE COURT: Well, the charge from which I
5 read at the time includes that sentence beginning,
6 "In other words," word for word. It could not have
7 come out of the air as far as the Reporter is con-
8 cerned. So, if that's what he wrote down in his
9 notes, I must have read it. Now, what we do with
10 that, let's wait to see, but I'll make a note of
11 that so that's our first problem, whether that is to
12 be included or not. Does the transcript include the
13 sentence, "But you must not rely upon this evidence?"

14 MR. ZWEIFACH: Yes, it does.

15 THE COURT: Just the sentence beginning with
16 "In other words," that was omitted from the transcript?

17 MR. ZWEIFACH: Well, let's see. I believe that
18 is correct, because the transcript reads, "Point two,
19 whether at the time she possessed the check she knew
20 it was stolen." The next sentence is, "But you must
21 not rely upon this evidence of other acts."

22 THE COURT: So there would appear to have
23 been omitted from the transcript the sentence reading,
24 "In other words, you may consider the similar acts,
25 if you find they occurred as evidence of the Defendant's

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2 knowledge, motive, intent, plan or the absence of
3 any mistake or accident," which I just read from
4 my draft of the charge?

5 MR. ZWEIFACH: The next portion of the charge,
6 Your Honor, is one of the points on appeal. The
7 first point in the Appellant's Brief. In my motion
8 papers I noted that one of the points on appeal, on
9 Appellant's Brief was there was extraneous material
10 which was read to the Jury regarding a Mr. Demetrio,
11 and also there was a reference to a conspiracy count
12 in the case. I brought on this motion after speaking
13 with an Attorney in my office who tried the case of
14 United States against Carmine Rotolo in front of Your
15 Honor and advised me there was a witness named Demetrio
16 in his case. I thought it was quite possible that
17 there was a transcribing error by the typist or possi-
18 bly an error by the Court Reporter in notes getting
19 intermeshed.

20 I would like Mr. Tessler now to continue
21 reading the charge. I believe it will indicate that
22 there was a gap in that portion that is now in the
23 transcript, reading from, "You may consider in deter-
24 mining whether the Defendant acted willfully,"
25 etcetera, on page 317 through the bottom of page 319

1
2 where Mr. Demetrio's name appears, this is not in
3 Mr. Tessler's notes. So, I would like him to read
4 from his notes to indicate that.

5 Q Mr. Tessler, the last line you read, "There-
6 fore, do not concern yourselves with any possible criminal
7 consequence of the similar transactions alleged by the
8 Government," I would like you to read what follows immediately
9 after that in your notes?

10 A Immediately after that I have, "A difficult
11 aspect of any Jury's duty is to determine the credibility
12 of the witnesses, and to weigh their testimony. In this
13 case it is a critical problem. You, the Jurors, are the
14 sole Judges of the credibility of the witnesses. Credibility
15 refers to believability of their testimony and the weight
16 their testimony deserves.

17 "Your determination of the issues of credibility
18 largely must depend upon the impression a witness made upon
19 you as to whether or not he or she was telling the truth
20 or giving you an accurate version of what occurred."

21 Q Mr. Tessler, just let me ask you, going back
22 to the sentence you read, "Therefore, do not concern your-
23 self with any possible criminal consequences of the similar
24 transactions alleged by the Government," between that
25 sentence and the point, "A difficult aspect of any Juror's

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2 duty to determine the credibility of the witnesses," etcetera,
3 is there anything in your notes to reflect that you stopped
4 transcribing at that point?

5 A No.

6 THE COURT: The claim of the Government is
7 that whatever is in the transcript between those
8 two points doesn't belong there?

9 MR. ZWEIFACH: That's correct, Your Honor.

10 THE COURT: How did it get there?

11 MR. ZWEIFACH: I spoke with Mr. Tessler about
12 this. I don't think there's any testimony that I
13 could elicit from him that could provide any useful
14 information. Quite frankly, after my discussions
15 with him, both of us were only speculating as to
16 how this happened, but we couldn't come up with an
17 answer as to what in fact happened.

18 THE COURT: Well, I can state for the record
19 what my file shows. I suppose I should. The charge
20 which I have under the Barbara Meyer's case includes
21 whatever was read by Mr. Tessler, that we previously
22 discussed going up through "therefore do not concern
23 yourselves with any possible criminal consequences
24 of the similar transactions alleged by the Government."
25 It then includes a section about similar acts and

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2 intent which has not been read, but which does
3 appear in the portion of the transcript annexed to
4 your affidavit as page 317, beginning with the
5 first full paragraph and going down through the first
6 full paragraph on 318. It ends with, "In determining
7 the state of mind with which the accused did the
8 act charged in the indictment." On my draft of
9 the charge on Barbara Meyers, then it goes to the
10 business of credibility, "A difficult aspect of any
11 Juror's duty is to determine the credibility."

12 I think if someone were to ask me what I
13 did, I would say I didn't remember. But following
14 my usual practice, I keep a copy of every charge that
15 I do, and I ad lib very little. I have no indication
16 in any of my notes here that I should ad lib any-
17 thing, so, that is my best evaluation of what my
18 notes are on the Barbara Meyers charge and that is I
19 would have read it just in the way it appears here
20 in my file.

21 The section that talks about Mr. Demetrio
22 is almost a verbatim copy of a page out of the charge
23 in the Rotolo case which I have here. There is not
24 way I can imagine how that got into the transcript.

25 I am certain I never read it as part of the

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2 charge in this case, the Barbara Meyers case. It
3 has no bearing on the Meyers case and had I said
4 something, I'm sure there would have been some kind
5 of an exception taken by somebody and they would have
6 told me that I was crazy, and I would have been.

7 So, Mr. Tessler, have you anything to add to
8 this, do you know how it got included?

9 THE WITNESS: I have no idea how it got in
10 the transcript.

11 THE COURT: It's not in your notes?

12 THE WITNESS: It's not.

13 THE COURT: There's nothing about Mr. Demetrio?

14 THE WITNESS: It doesn't exist in my notes.

15 That was a completely different case.

16 THE COURT: Were you the Reporter on that other
17 case?

18 THE WITNESS: I remember part of the Rotolo
19 case. Whether I was the Reporter for the whole trial,
20 I wouldn't be able to say, I don't remember that.

21 THE COURT: You wouldn't have anything on
22 Rotolo--I think I can get that information in a second.
23 I'll find out who the Reporter was--

24 THE WITNESS: I believe I took the charge.

25 THE COURT: You did take the charge?

1 THE WITNESS: Yes, Sir.

2
3 THE COURT: Anyone else got anything to
4 say?

5 MR. ZWEIFACH: I can speculate. I don't know
6 if it's worthwhile. I don't know if it happened here,
7 but I know that it's often times common practice of
8 some Court Reporters to check with the Judge to see
9 if the Judge has any prepared notes from a charge
10 just to make sure their transcription was accurate.

11 THE COURT: Frequently that happens. When-
12 ever a Reporter asks for the charge that I've just
13 read, I give it to him.

14 MR. ZWEIFACH: It's possible, although I had
15 asked Mr. Tessler about this, and he wasn't sure,
16 it's quite possible that somehow Mr. Tessler might
17 have missed the point that the paragraphs that you
18 have in your notes where it says, "You may consider
19 in determining whether the Defendant acted willfully,
20 the fact if you find it true that the Defendant
21 engaged in other transactions pursuant to that charge
22 in the indictment." It's possible that since those
23 paragraphs are missing from the notes, Mr. Tessler
24 might have gone to your charge and if he was at the
25 same time having the Rotolo case transcribed, there

might have been an error by the typist when he advised the typist just to fill in the similar act charge and it's possible that the similar acts charge in the Rotolocase has the same language atleast in the initial part but then begins to marshall the evidence as to the Demetrio conspiracy count. Again, that is speculation. I don't know if that helps figuring out what happened.

MR. BARRETT: Your Honor, may I make several inquiries?

THE COURT: You may, both of me and the Stenographer.

CROSS-EXAMINATION

BY MR. BARRETT:

Q Mr. Tessler, can you show me physically on this where the sentence appears, this is the sentence before the material that was deleted, "Therefore do not concern yourselves with any possible criminal consequences of similar transactions alleged by the Government?"

A I'm sorry, could you read slower?

Q "Therefore, do not concern yourselves with any possible criminal consequences of the similar transactions alleged by the Government."

A That starts about a little more than a quarter

1
2 of a way down on this first fold that I'm looking at here
3 and it says, "Therefore do not concern yourselves with
4 any possible criminal consequences of the similar trans-
5 actions alleged by the Government."

6 Q And the next, could you continue reading the
7 next two words?

8 A "A difficult aspect."

9 Q Where is, "Difficult aspect?"

10 A "Difficult aspect," right here.

11 Q What are the two asterisks?

12 A The two asterisks don't mean anything.

13 Q What do the asterisks indicate?

14 A I just paused for a second. I don't have to
15 stop reporting in order to make asterisks.

16 Q I understand. Is that a signal to you that
17 at that point you stopped reporting?

18 A One asterisk would mean, would mean to dis-
19 regard the sentence or line that preceeded it. Two asterisks
20 sometimes if there is a pause I--

21 Q Do you do that occasionally in other places?

22 A I haven't looked, but I would say yes.

23 Q Could you glance through for a moment? Those
24 two asterisks again for the record appear precisely at the
25 break point between the last sentence that appears in our

1
2 record and the deleted material or incorrectly reported
3 material?

4 A Sometimes I might hit it an asterisk if there's
5 a pause in the proceedings. If you just give me a second,
6 I'll look through that.

7 MR. BARRETT: Your Honor, while Mr. Tessler
8 is looking through that, may I address a question or
9 two to you?

10 THE COURT: Certainly.

11 MR. BARRETT: May I inquire whether the
12 prepared text that you have are read or memorized.

13 THE COURT: Certainly not memorized. They
14 are read.

15 MR. BARRETT: Are the pages bound together
16 by staples or by paper clips?

17 THE COURT: Paper clip, that is the pages
18 in question. There are some stapled sections, but
19 the pages in question are loose leaf pages which
20 were in the file with the paper clip.

21 MR. BARRETT: And is Your Honor familiar
22 with the exact section regarding the Demetrio testi-
23 mony that appears in the record, that does not appear
24 in the notes of the Stenographer, that being there
25 was testimony by Demetrio?

1
2 THE COURT: I have that page. I have that
3 charge here also. The portion that is in issue is
4 one page. I think probably what we ought to do is
5 get copies made of these pages and get them marked
6 as part of the record. Why don't you do that just
7 to clear things up.

8 MR. BARRETT: Would Your Honor just on that
9 one page tell me what the first couple of words are
10 and the last couple?

11 THE COURT: It begins, "There was testimony
12 by Demetrio that he had engaged in certain drug
13 transactions with the Defendant in 1972 and 1973,"
14 so forth. The last sentence is, "Therefore, do not
15 concern yourselves with any possible criminal con-
16 sequences in 1972, 1973 events or the discussions
17 with Mr. Demetrio after the time of his arrest on
18 April 14th, 1975."

19 MR. BARRETT: Might I also ask you Your Honor
20 to indicate that after the sentence, "Therefore do
21 not concern yourselves with any possible criminal
22 consequences of similar transactions alleged by the
23 Government," Your Honor then charged, "You may con-
24 sider in determining whether the Defendant acted
25 willfully--

1
2 THE COURT: That is the next page that
3 appears in the Meyers charge.

4 MR. BARRETT: Could Your Honor indicate what
5 the last words on that page are?

6 THE COURT: You made an interesting point,
7 the last line is, "With which the accused did the
8 act charged." That's the end of the page, it clearly
9 means, "Charged in the indictment." But the words,
10 "in the indictment," do not appear.

11 MR. BARRETT: The words "in the indictment,"
12 appear on the next page?

13 THE COURT: It says, "Charged in the words in
14 this indictment," appear there.

15 The next page is, "A difficult aspect of any
16 Juror's duty."

17 MR. BARRETT: Perhaps you might look, Your
18 Honor, at that page or at any other place on there
19 that it may appear?

20 THE COURT: You raised a question and I will
21 check it in a minute. While I'm checking it, I'm
22 going to number, just for the record, I'm going to
23 number the upper right hand corner with a circle
24 around the numbers, one for the page that begins,
25 "The Government has presented evidence." That conforms

1
2 to whatever leads up to page 317 of the transcript.
3 I'll number with number two in the right hand corner
4 the portion that begins, "You may consider in deter-
5 mining whether the Defendant acted willfully," and
6 ends up, "Did the act charged in," without the last
7 two words, "in the indictment." I'll number the
8 next page with number three for that portion of the
9 charge that begins, "A difficult aspect of any
10 Juror's duty is to determine the credibility of the
11 witnesses." I guess it's agreed the charge that
12 follows on from there is correct, in any event?

13 MR. BARRETT: Nothing that has to do with
14 Your Honor's presentation.

15 THE COURT: Those three pages I will also
16 number with the letter A in a circle in the upper
17 right hand corner, the page from the Rotolo charge
18 that begins, "There was testimony by Mr. Demetrio."
19 I'll ask the Clerk to make copies of all four to
20 make them part of the record.

21 MR. ZWEIFACH: Your Honor, in that Demetrio
22 charge, is there any proceeding language for that
23 charge, is there a boiler plate charge with regard
24 to prior similar acts before the evidence is marshalled?

25 THE COURT: That's what I'm about to look for.

1
2 The page itself was not a portion of the boiler plate
3 but is preceeded by a page which says, "Now let us
4 consider the crime of conspiracy in the context of
5 this case. I summarize what they have to find in
6 order to find them guilty of conspiracy. Then I go
7 on to that page that I've just marked with the letter
8 A. That is similar acts would probably be earlier.

9 CROSS-EXAMINATION

10 BY MR. BARRETT:

11 Q In the meantime, Mr. Tessler, have you found
12 any other examples of that?

13 A I found one in this.

14 Q Okay. Could you read me a few sentences
15 before the double asterisks and a few sentences after it
16 and read the first sentence, then give me a few seconds to
17 find where you are? This I take it is later in the charge?18 A Yes. "Where an objection to a question that
19 was sustained, disregard the question and draw no inferences
20 from its wording from the answer that might have been given
21 where an objection is overruled--".

22 Q That's enough. Could you wait just one second?

23 A Try five or six pages before the end?

24 Q Before the end of the entire charge?

25 A Yes.

1
2 Q Could you start reading it again, the same
3 portion then indicate when you hit the double asterisk, then
4 continue reading?

5 A "Where an objection to a question was sustained,
6 disregard the question and draw no inferences from its
7 wording from the answer that might have been given. Where
8 an objection is overruled, evidence then received has no
9 special weight, just because it was unsuccessfully objected
10 to. Under your oath as Jurors you cannot allow a consider-
11 ation of the sentence which may be imposed on the Defendant
12 if she is convicted, to enter into your deliberations or
13 to influence your verdict in any way.

14 "In the event of a conviction, the duty of
15 imposing sentence rests solely upon the Court. Your duty
16 is to decide the case solely upon the evidence, to weigh
17 the evidence in the case and to determine the guilt or innō-
18 cence of the Defendant solely upon the basis of such
19 evidence and these instructions. The verdict must be
20 unanimous. " Then there are two asterisks.

21 Q Before, "Each of you"?

22 A Before, "Each of you."

23 Q Do you have any recollection what that indi-
24 cated at that point?

25 A No.

1
2 MR. BARRETT: Your Honor, I'm satisfied that
3 the double asterisks don't indicate anything.

4 THE COURT: Now, in answer to your prior
5 question as to whether there was something in the
6 Rotolo charge about similar acts; my file under the
7 Rotolo charge consists of a check list as to the
8 boiler plate type charges, plus the pages making up
9 the substantive charge and what I refer to as the
10 substantive portions of the charge. All it shows
11 under other similar acts is a question mark. From
12 which I cannot determine whether or not I covered
13 that section of the charge in the Rotolo case or not.
14 So, I just can't answer your question and obviously
15 I don't remember.

16 THE WITNESS: Your Honor, there is a possibility.
17 We dictate our notes in the Federal Court on reel to
18 reel recorders. It is a small machine called a Grundig--

19 THE COURT: Stenorette?

20 THE WITNESS: Stenorette and those tapes are
21 given to the typist and when they're done they're
22 not erased, they're simply given back to the Reporter.
23 The Reporter puts them in his drawer and he uses
24 them as he needs them and dictates over it. What
25 might have happened, is the tape containing the

1
2 Rotolo case and the charge might have been the tape
3 that I used to dictate the Barbara Meyers charge.
4 There might have been a period where I might have
5 touched the mike, it might have spaced where I would
6 not talk, which talking whatever was on there under-
7 neath, it might have passed through and I might have
8 continued with the Meyers case.

9 THE COURT: Do we know which one came first?

10 THE WITNESS: Which case was dictated first?

11 THE COURT: Which trial came first?

12 THE WITNESS: Rotolo came first before Meyers.

13 MR. ZWEIFACH: I could obtain a copy of the
14 Rotolo transcript which would indicate the date of
15 the trial and also indicate what the similar acts
16 charge would be in that case.

17 THE COURT: It is my recollection that it did
18 occur sometime before the Meyers case.

19 MR. ZWEIFACH: Your Honor, in preparing for
20 this hearing, when I was speaking with Mr. Tessler,
21 I had a suspicion that another point that was raised
22 on appeal regarding the deficiancy of the voluntariness
23 charge might be incorrect. I went over Mr. Tessler's
24 notes with him regarding your voluntariness charge
25 and the voluntariness charge in his notes is much more

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2 elaborate and extensive than the voluntariness charge
3 that appears in the transcript that is now before
4 the Second Circuit.

5 Perhaps while we're waiting Mr. Tessler could
6 address himself to that, and perhaps we should, now
7 that we have this, we should just reach some conclu-
8 sion on this Demetrio charge.

9 THE COURT: Well, first as to what was tried
10 when, U.S. against Rotolo was tried beginning November
11 3th, according to my own notes and summations and
12 charge occurred on November 11th. That's apparently
13 one week prior to the Barbara Meyers case.

14 With respect to the first question, we discussed
15 here, I guess it's up to me to determine what the
16 correct record would be. I would say based upon--
17 wait a minute, Mr. Tessler, you have nothing in your
18 stenographic notes that supports what is in the record
19 that was transcribed upon pages 317 through the first
20 full paragraph on page 313?

21 THE WITNESS: Correct. That is referring to
22 Carmine Rotolo, and you're not talking about the
23 discussion about Demetrio?

24 THE COURT: Show him the transcript on page
25 317.

1 THE WITNESS: The transaction by the Government--

2 MR. ZWEIFACH: Right.

3 THE WITNESS: In between that?

4 THE COURT: How do your notes read after
5 similar transactions alleged by the Government, which
6 is at the end of the page and carries over onto page
7 317?
8

9 THE WITNESS: My notes read, "A difficult
10 aspect of any juror's duty is to determine the credi-
11 bility of the witnesses and to weigh their testimony
12 in this case."

13 THE COURT: All right.

14 THE WITNESS: A little further down--

15 THE COURT: Hold on just a minute. Before I
16 make any findings here, let's clear up the record.
17 My own notes from my file on the Barbara Meyers
18 charge, which I indicated I was marking with the
19 numbers one, two and three and the letter A have now
20 been Xeroxed and I'll have those marked as Court
21 Exhibits 1, 2, 3 and 4 respectively.

22 THE CLERK: So marked as Court Exhibits 1, 2
23 3 and 4.

24 MR. BARRETT: Your Honor, may I ask a couple
25 of questions?

1
2 THE COURT: On this portion of it?

3 MR. BARRETT: Oh, yes.

4 THE COURT: Go ahead, because I'm about to
5 come to a conclusion. Anything you say may help
6 me.

7 CROSS-EXAMINATION CONTINUING

8 BY MR. BARRETT:

9 Q Mr. Tessler, in general, not necessarily in
10 this case, in general, how do you prepare from your notes,
11 how do you go about transcribing a charge?

12 A I take my notes and dictate them and if I
13 were to come across a part, maybe I was unclear of the word-
14 ing or words, I would turn to the Judge's charge to compare
15 it.

16 Q What do you mean turn to?

17 A I would not use the prepared charge that the
18 Judge had to transcribe the charge. I wouldn't read from
19 the Judge's prepared charge. I would read the charge dire-
20 ctly from my notes and if there should be a portion, maybe
21 an ink blot or a word is covered, or I can't read it proper-
22 ly, then I turn to the prepared charge to see if it bears
23 out what I have in my notes.

24 Q Did you also type the transcript or was it
25 typed for you?

1
2 A That's done by a typist.

3 Q Do you happen to recall specifically in this
4 case having at any point gone to the Judge's charge?

5 A A direct recollection of having gone to the
6 Judge's charge? I can't remember that, whether I did or
7 didn't.

8 MR. BARRETT: Your Honor, I have an explan-
9 ation for what could have happened here, but I
10 suppose the only thing that lingers and troubles me
11 a bit is the fact that the part that was mistakenly
12 inserted, as well as the part that was mistakenly
13 deleted compares to four pages of your notes. What
14 conclusion can be drawn from that is something that
15 I'm really not quite certain of. But, what I think
16 is it does indicate, whatever conclusion you find
17 and whatever conclusion you draw, I think that what
18 it does indicate is that both the deletion and the
19 inclusion of the Demetrio material in question,
20 possibly can't be attributed to a tape machine, that
21 is a tape recording device as the witness suggested.

22 It would seem almost impossible that it were
23 not in some manner or another connected with your
24 notes. Now, I wouldn't go as far as to suggest that
25 when this was read to the Jury a page of your notes

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2 from the Demetrio case had been mistakenly incor-
3 porated into the set of notes of the charge in this
4 case. Because, I frankly can't see how that would
5 account for the state of Mr. Tessler's notes right
6 now. But, unfortunately, it's not my conclusion to
7 draw, but it is yours. I have pointed out to Your
8 Honor that somehow or another it seems that the
9 errors in the transcript, they are errors that must
10 be corrected with the precise notes and pages that
11 you have drawn as your notes for the charge.

12 THE COURT: Well, it appears to me that--

13 MR. ZWEIFACH: There is one point I would like
14 to make, Your Honor.

15 THE COURT: Yes?

16 MR. ZWEIFACH: I would agree that if we're
17 talking about probability, I would think that it's
18 probable that what's been marked--well, the problems
19 here do stem from--likely stem from Mr. Tessler's
20 having gone to your prepared notes in this case and
21 the Rotolo case. But one thing I think is clear,
22 the mere fact that what's been marked Government's
23 Exhibit Number Two, the fact that that portion has
24 been or rather is there deleted from Mr. Tessler's
25 notes, does not lead to the conclusion that what's

1
2 been marked as Exhibit A, because that was also not
3 in his notes, was necessarily read to the Jury. If
4 you follow what I'm saying, in other words--

5 THE COURT: I don't.

6 MR. ZWEIFACH: The mere fact that Exhibit Two
7 was deleted and the fact that A is deleted doesn't
8 mean because Two was probably read, then A was probably
9 read.

10 I don't think that--if we're going to draw
11 any conclusions, I don't think that conclusion can
12 be drawn.

13 THE WITNESS: What is deleted, what is supposed-
14 ly deleted?

15 MR. ZWEIFACH: What is deleted from your notes
16 is what's been marked as Court's Exhibit Number Two
17 and Exhibit Number A.

18 THE COURT: All right.

19 THE WITNESS: I mean as far as the Demetrio.
20 it's not in my notes. It should not be in my notes.
21 What else should be in my notes that you're saying
22 isn't in my notes?

23 THE COURT: The section that begins, "You
24 may consider," is not in your notes either. It seems
25 our consideration, let me put it this way. On consid-

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2 eration it seems that Mr. Tessler's notes are the
3 most reliable indicator of the sections of the charge
4 that were given. Had he stopped transcribing while
5 I gave the charge I would have been aware of it. Had
6 he been indisposed or taken ill or something that he
7 could not keep up with me, he would have brought it
8 to my attention. Neither of those things occurred.
9 I can say that it didn't because it's never occurred
10 to me during the course of a charge.

11 I've had Stanographers give out after 8 o'clock
12 at night, but generally not during the day light
13 hours. Working from that and the notes that I have
14 and knowing my own practice and dealing in assembling
15 charges, I would conclude that the portion of the
16 transcript which reflects what has been marked as
17 Court Exhibit Number One, that begins, "The Govern-
18 ment has presented evidence that it claims established
19 the Defendant engaged in," so forth and down through
20 "Do not concern yourselves with any possible criminal
21 consequence of similar acts transactions alleged by
22 the Government." That portion is included. Did
23 your notes include the sentence, "In other words,
24 you may consider," Mr. Tessler?

25 THE WITNESS: I'm sorry, where is this, where

1
2 would that come in?

3 THE COURT: Start reading, I'll tell you to
4 go one way or the other. Just pick a spot.

5 MR. ZWEIFACH: You begin by saying, "If you
6 find the Defendant has clearly, conclusively established?

7 THE WITNESS: "If you find that the Government
8 has clearly and conclusively established that the
9 Defendant performed acts similar to that charged in
10 the indictment, then you may use evidence of those
11 similar acts to help you determine one, whether the
12 Defendant willfully possessed the check in question
13 here, and two, whether at the time she possessed the
14 check she knew it was stolen.

15 "In other words, you may consider the similar
16 acts if you find they occurred as evidence of the
17 Defendant's knowledge, motive, intent, plan or absence
18 of any mistake or act."

19 THE COURT: Stop. That last sentence that
20 you've just read, beginning, "In other words," does
21 not appear in the transcript?

22 Is that correct?

23 MR. ZWEIFACH: That's correct.

24 THE COURT: It should. It's in my notes in
25 handwriting on a page that clearly related to Barbara

1
2 Court's Exhibit Three and Court's Exhibit Two and
3 Four which were included in the transcript as originally
4 prepared should be deleted.

5 Now, what other problems do we have?

6 MR. ZWEIFACH: Another problem Your Honor,
7 is another point in the Appellant's Brief, and that
8 is on your voluntariness charge, it does not comport
9 with the requirements of Section 3501 of Title 18.
10 But I looked at what purports to be your voluntariness
11 charge in the transcript, as it stands now, which
12 is page 327, the paragraph above the purported volun-
13 tariness charge was somewhat confusing to me; because
14 it appeared to me to be a charge that spliced together
15 statements regarding the Defendant's interest but then
16 it also appeared to me, it alluded to voluntariness.
17 I asked Mr. Tessler in the way here to review his
18 notes and it appears to be a flagrant error by or
19 whoever typed this who deleted a substantial portion
20 of what I believe to be your voluntariness charge.

21 So, I would like to direct Mr. Tessler to his
22 notes, and that would be page 326 of the transcript.

23 I'm going to read from the first full paragraph
24 on page 326.

25 "You may consider that a Defendant has a strong

1
2 motive to lie to protect herself, but you may also
3 consider that she takes a real risk in subjecting
4 herself to cross-examination, and you must decide
5 whether to believe or how much to believe."

6 Then the transcript continues: "Now, the
7 law permits, but does not require, the Defendant to
8 testify on her own behalf."

9 I would like Mr. Tessler to please begin
10 reading from the first statement that I read, "You
11 may consider that a Defendant has a strong motive to
12 lie to protect herself."

13 THE WITNESS: You want me to read it?

14 MR. ZWEIFACH: Yes, from the point, "You may
15 consider that a Defendant has a strong motive to lie
16 to protect herself."

17 THE WITNESS: "You may also consider that she
18 takes a real risk in subjecting herself--"

19 MR. ZWEIFACH: That's right.

20 THE WITNESS: "Subjecting herself to cross-
21 examination and you must decide whether to believe
22 her or how much to believe.

23 "Evidence relating to any statement claimed to
24 have been made by any Defendant outside of Court and
25 after a crime has committed should also be considered

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2 with caution and weighed with great care. All such
3 evidence should be disregarded entirely unless the
4 evidence in the case convinces you, beyond a reason-
5 able doubt that the statement was knowingly made.
6 I'm referring here of course to the statement of the
7 Defendant which was marked in evidence and as to the
8 other oral statement which were testified to by
9 Inspector Claus.

10 "Now, a statement is knowingly made if made
11 voluntarily and intentionally and not because of
12 mistake or accident or other innocent reason. In
13 determining whether any statement claimed, and state-
14 ment claimed to have been made by Defendant outside
15 of Court after a crime has been committed is knowingly
16 made, the Jury should consider the age, sex, training,
17 education, occupation and physical and mental condi-
18 tion of the Defendant and her treatment while in
19 custody, or under interrogation, as shown by the
20 evidence in the case; and also all other circumstances
21 in evidence surrounding the making of the statements,
22 including whether before the statement was made, the
23 Defendant knew or had been told and understood that
24 she was not obligated or required to make the statement
25 claimed to be made by her; that any statement she might

1
2 make could be used against her in Court; that she
3 was entitled to the assistance of Counsel before
4 making / statement, either orally or in writing,
5 or she was without money or means to obtain Counsel
6 of her own choice, and an Attorney would be provided."

7 MR. ZWEIFACH: Could you hold it one second?
8 I'd like to back track a bit.

9 THE COURT: Where do you begin having dis-
10 agreements with what he read?

11 MR. ZWEIFACH: From the beginning at the point
12 "Evidence" about five minutes ago.

13 THE COURT: Evidence relating to any statement?

14 MR. ZWEIFACH: That's correct. We just
15 started picking up where, "It is for you to decide
16 to what extent, if at all, Defendant's interest."
17 In effect, the whole vountariness charge.

18 REDIRECT EXAMINATION

19 BY MR. ZWEIFACH:

20 Q I'm going to make you backtrack to see where,
21 at what point you pick up in our transcript.

22 Do you find this statement immediately prior
23 to what you have just read, "In appraising her credibility
24 you may take the fact into consideration, however, I want to
25 say with equal force to you, by no means follows that if a

1
2 person--" do you find that?

3 A Before what you just read?

4 Q Located at the point where you said, "It is
5 for you to decide to what extent, if at all, Defendant's
6 interest has affected or colored her testimony, could be
7 used against her in Court, that she was entitled to assistance
8 of Counsel." That was the last thing you said, the last
9 point you read?

10 THE COURT: Let me see the transcript.

11 THE WITNESS: Oral or in writing, is that
12 what you're talking about?

13 MR. BARRETT: "You may consider that a
14 Defendant has strong motive--" I'm sorry. "It is for
15 you to decide to what extent," do you find that on
16 the record? "It is for you to decide to what extent,
17 if at all, Defendant's interest has affected or
18 colored her testimony," do those words appear, do
19 they follow the words, "Could be used against her
20 in a Court of Law."

21 A I didn't answer the question, I think you
22 just asked--

23 MR. ZWEIFACH: Why don't you take your time.

24 THE COURT: Before he answers, what my charge
25 reads when you get to "colored her testimony," that's

1
2 the end of the page entitled, "credibility of
3 Defendants."

4 Then the next page of my charge is headed,
5 "Voluntariness of the Statement (Confession)".

6 None of that appears in the transcript until
7 you get to the second page of it where it seems to
8 be picking up with the transcript again, "Could be
9 used against her in Court."

10 Let me check it and I'll see if the rest of
11 the transcript follows what my notes read.

12 (Short pause.)

13 THE COURT: The next page is followed in the
14 transcript. So, the first page of my section entitled
15 "Voluntariness of Statement (Confession)," is not
16 omitted from the transcript. Let's find out what
17 the Reporter's notes say at that point.

18 MR. ZWEIFACH: I believe I have Mr. Tessler
19 starting to read at page 326, after the phrase,
20 "believe her or how much to believe." It's at that
21 point his notes indicate that a voluntariness charge
22 begins. Perhaps he would like to read that back and
23 compare it with your notes.

24 THE COURT: You read that a moment ago.

25 MR. ZWEIFACH: Correct.

1
2 THE COURT: And what he said conformed with
3 the transcript?

4 MR. ZWEIFACH: No, not at all. What he read
5 from this point on does not conform to the transcript.

6 THE COURT: Let me follow the transcript.
7 Could you go back to that point again?

8 THE WITNESS: What part?

9 THE COURT: "The law permits but does not
10 require."

11 MR. ZWEIFACH: What Mr. Tessler read began
12 with the term, "Evidence", not with the law permits.
13 In other words, he didn't read any of this. Perhaps
14 he should read this whole paragraph and continue,
15 "you may consider."

16 THE WITNESS: From, "You may consider?"

17 THE COURT: Read that.

18 THE WITNESS: "You may consider that a Defendant
19 has a strong motive to lie to protect herself. But
20 you may also consider that she takes a real risk in
21 subjecting herself to cross-examination and you must
22 decide whether to believe her or how much to believe."

23 THE COURT: That conforms with the transcript,
24 and with the second paragraph of my notes on the
25 charge which are labeled, "Defendant as Witness."

1
2 Now, what do the Stenographer's notes
3 show comes next?

4 THE WITNESS: 'Evidence relating to any
5 statement claimed to have been made," shall I con-
6 tinue, Your Honor?

7 THE COURT: That's enough. What's now being
8 read is the first page of my voluntariness of state-
9 ments, confession, charge. What has not been read
10 but which appears in the transcript beginning, "Now
11 the law permits but does not require the Defendant
12 to testify, on behalf," that is an alternate charge
13 for the credibility of the Defendant if he takes
14 the stand, which is in my notes. In other words,
15 my notes contain two charges as to the credibility
16 of the Defendant. My practice is to use one or the
17 other, depending on the circumstances of the case.

18 I would find on the basis of what Mr. Tessler
19 wrote down that I used the one that he read, which
20 I'll mark Court's Exhibit Number Five.

21 The one that appears in the transcript, I'll
22 mark Court's Exhibit Six and I find that I did not
23 read that.

24 What he's about to read apparently beginning,
25 "Evidence relating to any statement," I'll mark as

1
2 Court Exhibit Number Seven, which is the first page
3 of a two page statement or two page section of the
4 charge and the second page of it I'll mark Court
5 Exhibit Number Eight.

6 Court Exhibit Number Eight is picked up on
7 the third line of the second paragraph of page three
8 twenty seven of the transcript.

9 So, now the thing to do, Mr. Tessler, is
10 read the part beginning, "Evidence relating to any
11 statement," and I'll see if it conforms to my notes
12 which I have marked Court's Exhibit Number Seven.

13 THE WITNESS: "Evidence relating to any
14 statement claimed to have been made by any Defendant
15 outside of Court and after a crime has been committed
16 should also be considered with caution and weighed
17 with great care, and all such evidence should be
18 disregard entirely unless the evidence in the case
19 convinces you, beyond a reasonable doubt, that the
20 statement was knowingly made.

21 "I'm referring here, of course, to the
22 statement of the Defendant, which was marked in
23 evidence and as to the other oral statement which
24 were testified to by Inspector Claus. Now, a state-
25 ment is knowingly made, if made voluntarily and inten-

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2 tionally, and not because of mistake or accident
3 or other innocent reason.

4 "In determining whether any statement claimed
5 to have been made by the Defendant outside of Court
6 after a crime has been committed is knowingly made,
7 the Jury should consider the age, sex, training,
8 education, occupation and physical and mental condi-
9 tion of the Defendant and her treatment while in
10 custody or under interrogation, as shown by the evi-
11 dence in the case; and also all other circumstances
12 in evidence surrounding the making of the statement,
13 including whether before--including whether before
14 the statement was made the Defendant knew or had been
15 told and understood that she was not obligated or
16 required to make the statement claimed to have been
17 made by her; that any statement she might make could
18 be used against her in Court."

19 THE COURT: Now we're back to the transcript
20 portion. Do you want him to read any further or
21 are you satisfied the transcript is accurate from
22 there on?

23 MR. BARRETT: I'm satisfied--I'm not satis-
24 fied the transcript is accurate at all.

25 MR. ZWEIFACH: I never pursued the point any

1
2 further with Mr. Tessler, Your Honor.

3 THE COURT: Continue reading to the end
4 of this section?

5 THE WITNESS: "That was untitled Assistance
6 of Counsel before making any statement, either orally
7 or in writing or she was without money or means to
8 obtain Counsel of her own choice and an attorney would
9 be provided to defend her free of charge. If the
10 evidence in the case has not convinced you beyond a
11 reasonable doubt that the Defendant's statements were
12 made voluntarily and intentionally, you should dis-
13 regard them entirely.

14 "On the other hand, if the evidence in the
15 case shows beyond, beyond a reasonable doubt that her
16 statements were in fact voluntary and intentionally
17 made, you may consider that as evidence in the case
18 against the Defendant who voluntarily and intention-
19 ally made the statement. The weight of the evidence--"

20 MR. ZWEIFACH: Okay. I think that last por-
21 tion basically complies with the language of the
22 transcript and at this point I'm satisfied that the
23 voluntariness point is there, Your Honor.

24 THE COURT: Well, based on what Mr. Tessler
25 has read, I'm satisfied that what he has now read is

1
2 the charge that was given. It largely tracks my notes
3 as reflected in what will be marked here as Court's
4 Exhibit Number Seven and Court's Exhibit Number Eight.

5 Just for the record, I have put on Court's
6 Exhibit Seven, as Mr. Tessler has read it, a couple
7 of notations which are in my handwriting in parenthe-
8 ses which shows what he read in place of the actual
9 words used. Just for example, in the first sentence
10 he said, "claimed to have been made by a Defendant,"
11 he read, "any Defendant." On Court's Exhibit Number
12 Seven he says a few words further on, he read, "should
13 always be considered." What I read from, Court's
14 Exhibit Seven says, "always be considered." I in-
15 serted, obviously, I ad libbed as to what statement
16 I was referring to, the written statement in evidence
17 and Inspector Claus' statement and that's about it.

18 So, my determination is as to what the record
19 should show is that it should show Court's Exhibit
20 five, seven and eight. It should not show, as it
21 does, Court's Exhibit six, because I would not have
22 given both Court's Exhibit five and Court's Exhibit
23 six, and since the notes record Exhibit five, it's
24 apparent that the transcript as prepared follow
25 Court's Exhibit six rather than five.

1
2 MR. BARRETT: What does five start with?

3 THE COURT: "The law imposes upon a Defendant."

4 MR. BARRETT: Was that read by Mr. Tessler?

5 THE COURT: He began with the next paragraph,
6 "You may consider."

7 Court's Exhibit Five is two paragraphs.

8 MR. BARRETT: We assume it's in his notes--

9 THE COURT: Is that in your notes?

10 THE WITNESS: I'm sorry?

11 THE COURT: Go back to where you began read-
12 ing all of this. "You may consider." Then go back
13 one more paragraph. You have the paragraph beginning
14 "The law never imposes." Read something?

15 THE WITNESS: "The law never imposes upon a
16 Defendant in a criminal case the burden or duty of
17 having to produce any evidence. But a Defendant may
18 --"

19 MR. BARRETT: Thank you.

20 THE COURT: That paragraph is there and it's
21 also followed by, "you may consider."

22 THE WITNESS: Yes.

23 THE COURT: So, Court's Exhibit five is in
24 the record and it should be on pages 325 and 326.
25 The portion of the record or transcript as it was

1
2 prepared beginning now with the "The law permits,"
3 which is the third or second full paragraph on page
4 326, and continuing over to the--well, into the
5 second paragraph on page 327, that's Court Exhibit
6 six, should not be there. Court's Exhibit seven
7 is omitted from the transcript and should be in
8 there as read by the Stenographer. Court's Exhibit
9 eight picks up with the word, "might," and the next
10 word, recorded as "might," should be "make."

11 It continues, "could be used against her."
12 That's Court Exhibit eight as in the transcript and
13 is properly there. I think that will clear it up.
14 We will make some Xerox copies of those so they can
15 be marked for the record in the case before the
16 Second Circuit so they can see how I arrived at these
17 conclusions.

18 Anything further?

19 MR. ZWEIFACH: Well, prior to coming here today
20 these are the only two points I explored with Mr.
21 Tessler. But, I'm beginning to think, given some
22 of the blatant gaps in the transcript that we so
23 far, perhaps if we have time, I would just look up
24 a couple of other points raised in Appellant's Brief?
25 At this point, I don't know one way or the other

1
2 Circuit denied your application to extend your
3 time to file your brief and the appeal is therefore
4 still pending before the Second Circuit. I don't
5 know whether even I have jurisdiction to conduct the
6 hearing which we have just about concluded over
7 here over the last hour and a half. Whatever the
8 Second Circuit may want to do with it, I guess it
9 would be up to them.

10 If they want to know what the charge actually
11 was, I think I have indicated that on the record.
12 They may well conclude, because of the state of the
13 record, that is before them, there's got to be a new
14 trial. If so, so be it. I'm sure they'll conclude
15 by looking at the transcript that is now before them
16 either that the transcript is inaccurate with respect
17 to the charge, or that I have taken leave of my
18 senses. I hope they'll give me the benefit of the
19 doubt, but I guess it's within their prerogative to
20 say we are bound by the record, and since there is
21 no formal correction of the record before us, so
22 be it.

23 A more practical solution might be to look at
24 what happened here today, being without jurisdiction
25 that I enter an order nonprotunk (ph). If they send

1
2 it back for that purpose we'll do it all over again.
3 If they send it back for a new trial, it will be
4 tried all over again, but not by me, because I'm
5 out here in Westbury and the Defendant has to be
6 tried in Brooklyn.

7 So, you've got some problems, but one of
8 the questions you're going to be met with, how did
9 Judge Pratt have any jurisdiction to hold the hear-
10 ing, and please explain to them that when I held it
11 I was not aware that they had denied a request to
12 have some of these things corrected.

13 MR. ZWEIFACH: I'm not sure of the answer to
14 that. The reason, at least, that I was given over
15 the phone for denying my request to extend the time
16 to file my brief was it was a very old case and a
17 date for argument had been set.

18 THE COURT: It may get older.

19 MR. ZWEIFACH: I'm not familiar with the juris-
20 dictional question.

21 THE COURT: It's very simply, once a notice of
22 appeal is filed, a District Judge has no jurisdiction
23 there is nothing he can do with the case. It isn't
24 the form any more.

25 MR. ZWEIFACH: I thought under Rule 36 at any

1
2 time, even after a notice of appeal--well, I haven't
3 researched this but my understanding was--

4 THE COURT: Criminal Rule 36 or Appellate
5 Rule 36?

6 MR. ZWEIFACH: Criminal Rule 36. At any time,
7 even after a notice of appeal has been filed, I
8 thought that a District Court Judge could correct
9 an error in the record. I also received that impres-
10 sion when I read an Association of the Bar Booklet
11 on Appellate Practice. Of course, there is a rule
12 and the rules have a procedure that permit the Second
13 Circuit to correct the record. But, preferable prac-
14 tice is to move to the District Court, if at all
15 possible.

16 THE COURT: I don't know whether I have got
17 the jurisdiction to do what I've done or not.
18 Frankly at this point I really don't care. The juris-
19 dictional point would seem to be more theoretical
20 than practical. If the Second Circuit wants to deter-
21 mine that I had no jurisdiction, then they're going
22 to have to deal with the transcript as it exists,
23 and then they're going to have to determine whether
24 on that transcript, the obvious error in talking
25 about Demetrio who had nothing to do with the case,

1
2 prejudiced her right to a fair trial in some way.

3 If they want to look at what really happened,
4 it's here, even though it may have been determined
5 in a proceeding which was beyond my jurisdiction.

6 I will let them wrestle with the problem.
7 It does not effect what I have done. I'm certainly
8 not going to cancel out the record that has just
9 been made.

10 What happened I think is reasonably clear to
11 me and hopefully it is now clear on the record, and
12 why it happened, I guess is left to anybody's specu-
13 lation, but it's probably irrelevant. Whether it
14 is of any use to the Second Circuit, they're going
15 to have to determine.

16 So, I guess there is nothing more I can do.
17 You have some other specific points you want to
18 focus upon while Mr. Tessler is here, I understand
19 he came up from Florida for this?

20 MR. ZWEIFACH: Yes.

21 THE COURT: You hate to bring him back.

22 MR. ZWEIFACH: Let me just ask you Your Honor,
23 whether at the outset your notes might indicate
24 whether you have a specific charge regarding any
25 limitation in the weight to be given to Appellant's

conviction of stolen property?

THE COURT: From her conviction?

MR. ZWEIFACH: A charge to the effect that it should only be viewed in terms of her credibility, vis-a-vis a prior or subsequent similar act?

(Long pause.)

THE COURT: No, I have nothing in my notes that would indicate that something like that was included in the charge. Was it?

MR. ZWEIFACH: No, it wasn't.

THE COURT: Next?

MR. ZWEIFACH: The next thing I would like to do is just perhaps, if Mr. Tessler could look at his notes with regard to a point that the prosecutor made in his summation, could I borrow my copy?

THE COURT: Yes. In summation you're going to find that the transcript reflects his notes reasonably accurately with the usual confusion between act, action and activities, and other problems that all Court Reporters have with people who drop their voices, don't speak clearly and symbols that are not always fully revealing.

MR. ZWEIFACH: In the meantime, could you find Mr. Teitler's summation?

1
2 THE WITNESS: I suppose the summation was
3 the same day as the Judge's charge?

4 THE COURT: No, it was the night before.

5 My Law Clerk has just pointed out to me that
6 under the Appellate Rule 10E I have jurisdiction to
7 correct the record, I guess up until any time the
8 Court of Appeals makes it's decision. I have corrected
9 it. You just bring it to their attention and see
10 what happens.

11 MR. ZWEIFACH: My motion papers were filed,
12 under Rule 10E and Rule 36.

13 THE COURT: I noticed that.

14 MR. ZWEIFACH: And my application to the
15 Second Circuit indicated that.

16 THE COURT: Okay.

17 MR. ZWEIFACH: Go to the rebuttal?

18 THE WITNESS: To the rebuttal?

19 This is after the other summation--

20 MR. ZWEIFACH: Right before the charge begins?

21 THE WITNESS: This is all separated here.

22 THE COURT: What is it that you want him to
23 read?

24 MR. ZWEIFACH: There is a point in the prose-
25 cutor's rebuttal argument, in summation, that is

1 criticized. The transcript indicates, "I think
2 the Government pretty well establishes, and the Def-
3 ense established what type of believability Mrs.
4 Meyers had in this case. This business of possessing
5 stolen property is not new in the sense that we have
6 shown that she has been involved with other checks.
7 In fact, solely as it bears on the credibility we
8 have shown from cross-examination she was convicted
9 on April 15th, 1965 of criminal possession of stolen
10 property. That, the Court will tell you, will not
11 prove she is guilty, but it bears on her believability
12 here as a witness, because it bears on her ability
13 to tell the truth as to her dishonesty."
14

15 Apparently Mr. Teitler, if this is in fact
16 what he said, closely blended in to the prior convic-
17 tion with the concept of other similar acts. I want
18 to see if there was anything in there that would
19 make it more clear and if in fact that was said.

20 THE WITNESS: The rebuttal?

21 MR. ZWEIFACH: I think the Government pretty
22 well establishes.

23 THE WITNESS: How far into the rebuttal case
24 is that?

25 MR. ZWEIFACH: Five pages from the end.

(Short pause.)

MR. BARRETT: Your Honor, I'm not at all together sure we should be doing this now, since there is no basis for believing there is any error at this point--specifically on this point as opposed to throughout the trial. So I supposed I object in a sense, I don't think it's necessary or I don't think there's been any showing to go on to this particular piece of the transcript.

THE COURT: I'm not even sure what he's looking for.

MR. ZWEIFACH: It's just a statement of Mr. Teitler in his rebuttal summation.

THE COURT: You're wondering if he actually put it into the transcript?

MR. ZWEIFACH: Yes.

THE COURT: You're not likely to run into the same problem there as you do with the charge where he works from printed matter, pretyped material getting that from me as well as his notes. He had nothing to work with as far as that. Whatever's in the transcript he got from his notes.

The kind of problem we had with the charge obviously came because some pages got shuffled back

1
2 and forth amongst the charge or the two charges that
3 he had. You don't have that problem in summation.

4 MR. ZWEIFACH: I agree with that. I was just
5 perhaps wondering if infact a mistake was made.

6 THE COURT: Why don't you work with him your-
7 self and see what was really said. Do you have a
8 copy of the transcript?

9 MR. BARRETT: No, I do have the summation,
10 I have the typed summation. What page is that?

11 MR. ZWEIFACH: 219.

12 THE WITNESS: "If you believe", after that,
13 want me to read?

14 MR. ZWEIFACH: The Government pretty well
15 establishes--

16 THE WITNESS: "And the Defense establishes
17 what type of believability Mrs. Meyers has in this
18 case. This business of possessing stolen property is
19 not new in the sense that we have shown that she
20 has been involved with other checks. In fact, solely
21 as it bears on her credibility we have shown on
22 cross-examination she was convicted on April 5, 1976
23 of criminal possession of stolen property. As the
24 Court will tell you that will not prove that she is
25 guilty here, but it will bear on her ability as a

witness, because it bears on her ability to tell the truth and her honesty or dishonesty.

"The question of do you believe the Government's evidence or do you believe the Defendant, if you believe the Government's evidence you must convict this Defendant."

MR. ZWEIFACH: That's it. I'm satisfied, Your Honor, that is cleared up.

THE COURT: What he read is substantially what appears in the transcript that you gave him? Does that do it?

MR. ZWEIFACH: I think that does it.

THE COURT: All right, thank you Gentlemen.

MR. ZWEIFACH: Thank you very much.

THE COURT: Have a Happy New Year.

(Whereupon, these proceedings were concluded.)

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W I T N E S S :For the Government:

	<u>Direct</u>	<u>Voir Dire</u>	<u>Cross</u>	<u>Redirect</u>
Steven Tessler	4	7	21	44

000

E X H I B I T S :For the Government:

	<u>In Evi.</u>	<u>For Ident.</u>
1 Reporter's Notes of 11/17/76 & 11/18/76	10	5
2 Reporter's notes of 11/18/76	10	6
3 Reporter's notes of 11/18/76	10	7

000

For the Court:

5 Court's Charge on Credibility	48
6 Court's Alternate Charge on Credibility	48
7 Page One of Court's Charge on Evidence	49
8 Second Page of Court's Charge on Evidence	49

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(SIMILAR ACTS)

THE GOVERNMENT HAS PRESENTED EVIDENCE THAT IT CLAIMS ESTABLISHES THAT THE DEFENDANT ENGAGED IN OTHER TRANSACTIONS SIMILAR TO THAT CHARGED IN THE INDICTMENT. YOU MUST NOT TAKE THIS EVIDENCE AS EVIDENCE OF THE DEFENDANT HAVING A CRIMINAL CHARACTER OR CRIMINAL DISPOSITION. AND YOU MUST REMEMBER THAT THE DEFENDANT MAY BE FOUND GUILTY ONLY IF YOU FIND BEYOND A REASONABLE DOUBT THAT SHE COMMITTED THE OFFENSE CHARGED IN ~~THE~~ INDICTMENT.

(CLEARLY AND CONCLUSIVELY)

BUT, IF YOU FIND THAT THE GOVERNMENT HAS ESTABLISHED THAT THE DEFENDANT PERFORMED ~~THOSE~~ ACTS SIMILAR TO THAT CHARGED IN THE INDICTMENT, THEN YOU MAY USE EVIDENCE OF THOSE SIMILAR ACTS TO HELP YOU DETERMINE (1) WHETHER THE DEFENDANT "WILLFULLY" POSSESSED THE CHECK IN QUESTION ^{HERE} AND (2) WHETHER AT THE TIME SHE POSSESSED THE CHECK SHE KNEW THAT IT WAS STOLEN. ^{IN ANY} ~~EVENT~~ ^{But} YOU MUST NOT RELY UPON THIS EVIDENCE OF OTHER ACTS FOR ANY OTHER PURPOSE.

In other words you may consider the similar acts if you find them occurred, as evidence of the defendant's knowledge or intent at the time of the act.

WITH RESPECT TO A CHECK WHICH SHE ALLEGEDLY POSSESSED ON ~~OR ABOUT THE 3RD OF DECEMBER IN 1975,~~ ~~AND THAT IT WOULD BE IMPROPER FOR YOU TO CONVICT HER OF A CRIME NOT CHARGED IN THE INDICTMENT. THEREFORE, DO NOT CONCERN YOURSELVES WITH ANY POSSIBLE CRIMINAL CONSEQUENCES OF THE SIMILAR TRANSACTIONS ALLEGED BY THE GOVERNMENT~~



2

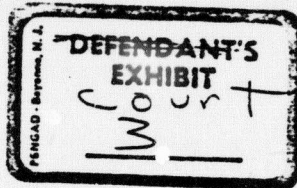
REQUEST NO. 3

Similar Acts - Intent

You may consider, in determining whether the defendant acted ~~with guilty knowledge or intent~~ ^{willfully}, the fact, if you find it true, that the defendant engaged in other transactions similar to ~~those~~ ^{that} charged in the indictment.

The fact, however, that the accused may have committed another offense at some time, is not any evidence or proof whatever that at another time, the accused committed the offenses charged in the indictment even though both offenses are of a like nature. Evidence as to an alleged prior or later offense of a like nature may not be considered by the jury in determining whether the accused did the act charged in the indictment. Nor may such evidence be considered for any other purpose whatever, unless the jury first finds that other evidence in the case, standing alone, establishes beyond a reasonable doubt, that the accused did the acts charged in the indictment, leaving aside only the question of whether the accused did it ~~knowingly, intentionally and~~ willfully.

If the jury should find beyond a reasonable doubt from the evidence in the case, that the accused did the act charged in the indictment, then the jury may consider the evidence as to an alleged earlier offense of a like nature, in determining the state of mind, ~~knowledge, intent or~~ ^{willfulness} with which the accused did the act charged in



3

ILITY
UE

A difficult aspect of any jury's ^{del}is to determine the credibility of the witnesses and to weigh their testimony. In this case ^{it is a}they are the critical problem.

~~(The government through its witnesses and other evidence asserts that the defendants were two of the bank robbers. Both defendants took the witness stand and denied their participation; each of them stating they were elsewhere at the time, and each of them presenting evidence in support of his claim.)~~

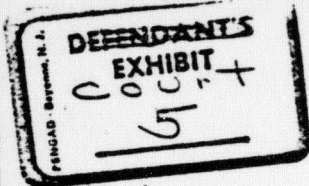
admit
this
No we want
to adapt this

There was testimony by Mr. DeMetrio that he had ^(A)
engaged in certain drug transactions ^{with the defendant} in 1972 and 1973
and prior to the events charged in the indictment - ~~then~~
Mr. DeMetrio also testified to ~~his connection with the~~
defendant ~~after DeMetrio's arrest~~ while he was cooperating
with the government. ~~These acts + statements are not to be taken~~ 106:10
~~you as evidence of a criminal~~
~~charge or criminal disposition~~

~~The testimony indicates that in 1973, the defendant~~
the accused was involved in the importation of amphetamines
from Mexico, and that in December, 1974, he discussed
with Mr. Rebackoff, a transaction involving pills that
were stimulants or depressants. ~~But,~~
If you believe this
testimony, and if you find that the Government has
established that the defendant performed those acts, or
made those statements, and if you find that they were
similar to acts at issue here, then you may use testimony
of those similar acts to help you determine ⁽¹⁾ whether the
defendant's acts relating to the charge in this indictment
were knowingly or willfully performed by the defendant,
or whether they were innocently performed, ~~whether or not~~ ⁽²⁾ see
A

However, the defendant is here to defend only
the charge in this indictment ^{which alleges a conspiracy between 8/5/74 + 3/10/75, and in this}
It would be improper for ^{3 specific dates}
you to convict him of a crime not charged in this indictment. ^{8/5/74}
^{therefore} Do not concern yourself with any possible criminal ^{9/9/74}
consequences of the 1973 ²⁻⁷³ events ~~at the Mexican border~~ ^{3/10/75}
or the ~~1973~~ discussions with Mr. ~~Rebackoff~~ ^{DeMetrio after his arrest} ^{on 4/11/75}

DEFENDANT'S
EXHIBIT
7
106:10



When Δ testifies

11-7a
Cts E 5

DEFENDANT
AS
WITNESS

The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence. But a defendant may present himself as a witness, as ~~Mr.~~ ^{she} ~~Floyd and Mr. Olive each~~ did in this case. In that event, the defendant is subject to cross-examination, as you have observed, and ~~his~~ ^{her} credibility is for you, as the jury, to determine, in the same manner as other witnesses.

You may consider that a defendant has a strong motive to lie to protect ~~himself~~ ^{herself}, but you may also consider that ~~she~~ takes a real risk in subjecting ~~himself~~ ^{herself} to cross-examination and you must decide whether to believe ~~him~~ ^{her} or how much to believe.

CREDIBILITY OF DEFENDANT

if she testifies

Chs 66

DEFENDANT'S
EXHIBIT
Court +
6

NOW THE LAW PERMITS BUT DOES NOT REQUIRE THE DEFENDANT
TO TESTIFY ON ~~HER~~^{HER} OWN BEHALF. OBVIOUSLY A DEFENDANT HAS A
DEEP PERSONAL INTEREST AS A RESULT OF ~~HER~~^{HER} PROSECUTION, INDEED
IT IS FAIR TO SAY ~~SHE~~^{SHE} HAS THE GREATEST INTEREST IN ITS OUTCOME.

INTEREST CREATES A MOTIVE FOR FALSE TESTIMONY AND A
DEFENDANT'S INTEREST IN THE RESULT OF ~~HER~~^{HER} TRIAL IS OF A
CHARACTER POSSESSED BY NO OTHER WITNESS.

IN APPRAISING ~~HER~~^{HER} CREDIBILITY, YOU MAY TAKE THAT FACT
INTO CONSIDERATION.

HOWEVER, I WANT TO SAY THIS WITH EQUAL FORCE TO YOU --
~~HOWEVER~~ IT BY NO MEANS FOLLOWS THAT SIMPLY BECAUSE A PERSON
HAS A VITAL INTEREST IN THE END RESULT, THAT ~~SHE~~^{SHE} IS NOT CAPABLE
OF TELLING A TRUTHFUL AND STRAIGHTFORWARD STORY.

IT IS FOR YOU TO DECIDE TO WHAT EXTENT, IF AT ALL,
DEFENDANT'S INTEREST HAS AFFECTED OR COLORED ~~HER~~^{HER} TESTIMONY.

11.7.1 C2 E2 7

(VOLUNTARINESS OF STATEMENT (CONFESSION))

EVIDENCE RELATING TO ANY STATEMENT, ~~OR ACT, OR OMIS-~~
~~SION~~, CLAIMED TO HAVE BEEN MADE ~~OR DONE~~ BY A DEFENDANT OUTSIDE
OF COURT, AND AFTER A CRIME HAS BEEN COMMITTED, SHOULD ALWAYS
BE CONSIDERED WITH CAUTION AND WEIGHED WITH GREAT CARE; AND ALL
SUCH EVIDENCE SHOULD BE DISREGARDED ENTIRELY, UNLESS THE EVIDENCE
IN THE CASE CONVINCES THE JURY BEYOND A REASONABLE DOUBT THAT THE
STATEMENT ~~OR ACT OR OMIS-~~ ~~SION~~ WAS KNOWINGLY MADE OR DONE. (ad lib.)

A STATEMENT ~~OR ACT OR OMIS-~~ ~~SION~~ IS "KNOWINGLY" MADE ~~OR~~
~~DONE~~, IF ~~DONE~~ VOLUNTARILY AND INTENTIONALLY, AND NOT BECAUSE OF
MISTAKE OR ACCIDENT OR OTHER INNOCENT REASON,

IN DETERMINING WHETHER ANY STATEMENT ~~OR ACT OR OMIS-~~ ~~SION~~
CLAIMED TO HAVE BEEN MADE BY A DEFENDANT OUTSIDE OF COURT, AFTER
A CRIME HAS BEEN COMMITTED, WAS KNOWINGLY MADE ~~OR DONE~~, THE JURY
SHOULD CONSIDER THE AGE, SEX, TRAINING, EDUCATION, OCCUPATION,
AND PHYSICAL AND MENTAL CONDITION OF THE DEFENDANT, AND ~~WAS~~ HER
TREATMENT WHILE IN CUSTODY OR UNDER INTERROGATION, AS SHOWN BY
THE EVIDENCE IN THE CASE; AND ALSO ALL OTHER CIRCUMSTANCES IN
EVIDENCE SURROUNDING THE MAKING OF THE STATEMENT ~~OR ACT OR~~
~~OMIS-~~ ~~SION~~, INCLUDING WHETHER, BEFORE THE STATEMENT ~~OR ACT OR~~
~~OMIS-~~ ~~SION~~ WAS MADE ~~OR DONE~~, THE DEFENDANT KNEW OR HAD BEEN TOLD
AND UNDERSTOOD THAT SHE WAS NOT OBLIGATED OR REQUIRED TO MAKE ~~OR~~
~~DO~~ THE STATEMENT ~~OR ACT OR OMIS-~~ ~~SION~~ CLAIMED TO HAVE BEEN MADE
~~OR DONE~~ BY ~~HER~~; THAT ANY STATEMENT ~~OR ACT OR OMIS-~~ ~~SION~~ WHICH SHE

(C&E8)
11.7.1a

HER

MIGHT MAKE ~~OR DO~~ COULD BE USED AGAINST ~~HER~~ IN COURT; THAT SHE
 WAS ENTITLED TO THE ASSISTANCE OF COUNSEL BEFORE MAKING ANY
 STATEMENT, EITHER ORAL OR IN WRITING, ~~OR BEFORE DOING ANY ACT~~
~~OR OMISSION;~~ (or) AND TH^{HER} IF SHE WAS WITHOUT MONEY OR MEANS TO RETAIN
 COUNSEL OF ~~HIS~~ ^{HER} OWN CHOICE, AN ATTORNEY WOULD BE APPOINTED TO ADVISE
 AND REPRESENT ~~HIM~~ ^{HER} FREE OF COST OR OBLIGATION.

IF THE EVIDENCE IN THE CASE DOES NOT CONVINCE BEYOND
~~STATEMENT~~
 A REASONABLE DOUBT THAT A ~~CONFESSION~~ WAS MADE VOLUNTARILY AND
 INTENTIONALLY YOU SHOULD DISREGARD IT ENTIRELY. ON THE OTHER
 HAND, IF THE EVIDENCE IN THE CASE DOES SHOW BEYOND ~~THE~~ ^A REASON-
~~STATEMENT~~
 ABLE DOUBT THAT A ~~CONFESSION~~ WAS IN FACT VOLUNTARILY AND
 INTENTIONALLY MADE BY A DEFENDANT, YOU MAY CONSIDER IT AS
 EVIDENCE IN THE CASE AGAINST THE DEFENDANT WHO VOLUNTARILY
~~STATEMENT~~
 AND INTENTIONALLY MADE THE ~~CONFESSION~~.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES BYRD

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 5th day of January 1978 he served a copy of the within

SUPPLEMENTAL BRIEF AND APPENDIX

by placing the same in a properly postpaid franked envelope addressed to:
Legal Aid Society, 509 U.S. Courthouse, Foley Square, N.Y., N.Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

5th day of January 1978

Barbara A. Allen
BARBARA A. ALLEN
Notary Public, State of New York
No. 24-2346024
Qualified in Kings County
Commission Expires March 30, 1979